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IN THE

Supreme Court of the U. S.

NO. 125. OF DECEMBER TERM 1862.

ROBERT T. HARVEY et al. Plaintiffs in Error,

vs

HENRY J. WHITEHOUSE et al. Defendants in Error.

Abstract of Case and Brief of Defendants in Error.

B. H. SMITH,

Attorney for Defendant in Error.

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ROBERT T. HARVEY, et al.
Plaintiffs in Error.

vs

HENRY J. WHITEHOUSE, et al.
Defendants in Error.

Error to the U. S. District Court for the Western District of Virginia.

Defendant's Abstract of the Case and Brief.

This was an action of Ejectment in the District Court of the United States for the Western District of Virginia, instituted by the Defendants in error against the Plaintiffs in error, in said Court holden at the town of Charleston, for 100,000 acres of land.

The Plaintiffs below filed declaration with eight counts, in conformity to the law of Virginia—Code of Virginia, Chapter 135. See whole Chapter, and as to separate counts, Sec. 10. There was a Demurrer to the declaration, which was overruled. The declaration according to Act, Sec. 7.

On the 19th of July 1860, a jury was sworn, who, on the 11th day of August, 1860, returned a verdict in favor of Defendants in error for the land, in the declaration described, excepting some specific tracts, in favor of certain of the defendants in the court below, who are not Plaintiffs in error. See printed record, 31-2-3.

The Plaintiffs in error took a bill of exceptions to the opinions of the Court, by which, among other things, it appears, that the title of Plaintiffs below, was founded on a Patent to Samuel Hollingsworth for 100,000 acres, dated March 3d, 1796.

That by Deed of 22d August 1799, the Patentee conveyed a moiety of the land to Jesse Waln, Robert Waln, John Hollingsworth Junior, John Shallcross, Isaac Wharton and David Lewis. That the latter parties, in the year 1800, conveyed by Deed to Abijah Dawes. That the title to all the land became vested in the Bank of Delaware and John Hollingsworth Junior and John Shallcross, who conveyed to Joseph Willard, who conveyed to Matthias Bruen, by Deed, dated April 14th, 1815, and recorded in Kanawha County, July 17th, 1817.

It is admitted, that the Defendants in error, in whose favor the verdict was rendered, deduced regular title from Matthias Bruen for all the land, and it was also admitted that the title to said land was regularly transmitted from the Patentee, Samuel Hollingsworth, to the Defendants in error, unless prevented by forfeiture to the literary fund.

The Plaintiffs below gave in evidence the Auditor's list of delinquent lands for the year 1820, and prior thereto, and also a delinquent list of auditor, from 1821 to 1831 both inclusive. An abstract of the first found on page 63 of the Record; of the other, on page 64. They also gave in evidence the orders of the County Court, of Kanawha County, three in number, exonerating the land in controversy from taxes for all time prior to the year 1831. See Record, pages 54-5-6-7-8. For the law under which these orders were made, see the Supplement to the Revised Code, pages 354-5, Sec's 21-2, and the chapter generally, of which those sections form a part. See also the Revised Code, Vol II, pages 552-3, §41-2. And see also Supplement, pages 341-2, §1-2

The Plaintiffs also gave in evidence the two lists of exonerated lands, made out by the auditor of public accounts, Record, pages 50-1-2-3. And also a list of lands forfeited for non payment of taxes, dated the day of , 1838. See Session Act of Virginia, passed March 15th, 1838. In this list there are 331 tracts forfeited, but none of the land in controversy is embraced in the list; but a tract of Jesse Waller et al, appears delinquent. There is another list of the 15th of Nov., 1838, the caption and certificate to which are printed, but the list itself omitted. The list, if produced, will show that the Bruen land, or that in controversy, is not embraced

The printed lists referred to, are those first published in 1831 and 2. As all these show no facts, they are not worthy of notice.

The Plaintiffs, as appears by the record offered four lists of exonerations by the auditor, only two of which are found in the printed record. See Record, page 50. The Plaintiffs also gave in evidence a list of entries and surveys made by the defendants or some of them on the land in controversy. See Record, pages 48-9.

The Defendants below offered evidence tending to prove, that in 1817, and prior thereto, the 100,000 acres of land in controversy was in forest and uninhabited, and Plaintiffs offered evidence tending to prove the contrary; and that there was property on the premises on which levy could have been made, and taxes paid in 1815-16-17. The Defendants also offered evidence tending to prove that the land in controversy, in Nov., 1831, lay partly in the counties of Mason, Jackson, and Kanawha, but not more than 30,000 acres in Kanawha, and that before Jackson County was established, the larger portion was in Kanawha. The Defendants below also proved, that Matthias Bruen had a tract of 50,000 acres joining. And after Jackson County was established, only one-tenth lay in Kanawha, and was so located on the 14th of April, 1831. That said Matthias Bruen had another tract of 47,000 acres wholly in Kanawha, but that it did not, by eighty rods, join the other tracts, and that all the tracts were derived from the same title; and that the three tracts lay wholly in Kanawha County, when the grants issued for the same.

The Plaintiffs below also proved that seventy-five of the defendants resided on the land in controversy.

The Defendants, William Hill, Jonathan Pfost and Nathan Casto, gave in evidence two title bonds, one to Saxton, the other to Crooks. One assigned by John Jividen, in 1857, to William Hill, who also gave in evidence a Deed from said Jividen to Hill, dated in 1850. These Bonds and Deed are copied in the Record; see pages 43-4-5-6-7.

The Defendants below also offered evidence tending to prove they had occupied said lands from 1826, and that the two places described in the bonds aforesaid were occupied in

1817: one by Crooks, the other by Saxton, under their title bonds, and a part of the time by John Jividen.

The plaintiffs below offered evidence tending to prove that the Defendants claimed no title to the land, but claimed to hold under Bruen, and the Defendants offered evidence tending to prove that the occupants had sold their improvements to their successors, some of whom had entered on the lands in controversy, from 14 to 20 years or more, before suit, without privity of contract with Bruen, they, the Defendants all the time holding, occupying and using the same, in several and separate parcels, uninteruptedly in the usual way persons hold use and treat their own property, *but without any claim or color of title thereto.*

The Defendants below also offered the records of the County Court of Kanawha County, showing the magistrates who were sitting during the days the Judgments of exoneration of the land in controversy were entered. They also offered the commissions of divers magistrates of the County Court for Kanawha County, showing the dates and qualification of such magistrates. See Record Pages 54-5-6-7-8-9-60-1-2.

The Defendants also gave in evidence the certificates of Auditor Bennett showing the delinquency of the land and the amount of taxes which appeared to have been paid. See Record, Pages 65-6-7.

The Defendants also offered a transcript from the Commissioner's Book of Kanawha County designed to show the taxes charged on the land in controversy, in which transcript or abstract he introduces 100,000 acres without any description of the land, charged to Jesse Waller & Co. for ten years. See Record pages 67-8-9. There is nothing to show that Jesse Waller and others ever had any title to the land, and Jesse Waln and others through whom title to a moiety was derived, conveyed that moiety to Abijah Dawes in the year 1800. See Record, Page 41. If charged to Jesse Waln et al, after 1800, it would be error. They then had no land.

At the close of the evidence the Defendants below presented three series of instructions, the first series being 24 in number, the 2nd 10, and the 3d series 10. All of which the Court refused to give, except the 1st and 2nd in the first series, and the 10th

in the second series. And the Plaintiffs below asked for three instructions, which were all given. And the exception of the Plaintiffs in error, is to *the refusal of the Court to give to the jury the instructions asked by them, and giving those asked by the Defendants in error.* The exception is the refusal to give the instructions collectively, not severally. Under this exception, if one of the instructions was bad, then all should be rejected.

Many of the instructions asked by the Defendants below, are abstract propositions of law, unwarranted and unsustained by the evidence set forth in the bill of exceptions, as well as erroneous in law; and for these reasons should be rejected. Others are complicated and involved, difficult to understand, and uncertain as to their meaning, and for these causes alone should be rejected.

From the number of instructions asked, and the profusion of language in which they are couched, it would be tedious to follow them separately, and answer each in the order in which they arise. There are several subjects or points of defence, which it was the purpose of the Plaintiffs in Error to raise. By noticing these and not following the instructions, the case will be more easily approached, and more readily understood.

The title of the Defendants in error is fully admitted as superior, unless it has been forfeited. See Record Page 29. The Plaintiffs in error insist that the law gave no remedy for the release of the land for the year 1831. That the 21st and 22nd Sections of the Act of 1st April 1831, did not authorize the release of land not *then* returned delinquent. See Supplement to Revised Code of Virginia, Pages 354-5. These Sections were first enacted 9th Feb'y 1814. See Rev. Code 2 Vol. 552. Sec. 41. Here the Act used the language, "*heretofore delinquent.*" For its next appearance, see Sup. to Code, 341-2, Sec's 1-2.

In this, the words, "heretofore delinquent" are omitted, and it limits the delinquency to a period of more than a year thereafter. Then follow the aforesaid Sections 21 and 22 in the Act of 1st April 1831. It is contended by the Defendants in error, that this Act applies to all cases of delinquencies, which may exist while the Sections are in force.

The 22nd Section provides for the correction of errors of

entry as well as cases of actual *payment*. The statute is remedial and to avoid forfeiture, should be liberally construed. The 2nd Section of the Act passed March 10th 1832. Sup. 357, recognizes the year 1831, as a year for which an exoneration can be had. If it cannot be exonerated, still, by the Act of 1832 last refered to, it is released, as the tax for the year 1831 is only $8, and all before 1831 is exonerated, leaving only the year 1831, which is less than $10.

The redeeming clauses of all the Sections of the Act of 1st April 1831 are in the same language. See Sup. 546 and 7. The Act of 1832 Sup. 559-560-1. changes the whole system of delinquent lands after 1831. They are to be sold by Sheriff instead of being forfeited and sold as provided by the 18th Sec. of Act of 1st April 1831. For the year 1831 the forfeiture the same as the years prior thereto. After that, no forfeiture, but sale by Sheriff for delinquency. The Act of 1832 gives legislative construction to the 21st and 22nd Sections of the Act of April 1831, and regards those Sections as authorizing the exoneration from delinquencies for the year 1831. The Sections 21 and 22 are to be interpreted as alluding to the *Status* of the land at the time of application, not at the time of the passage of the Act. This last Act excludes land vested in the literary fund. The exclusion of one includes all others.

The next question is the effect of the orders of the County Court in 1831 and 1832 releasing the land. The Act of 1814, 2, Rev. Code Page 550 vests all land not sold, in the literary fund, after which, not chargeable with taxes. Sec. 30. The presumption of law is, that all officers do their duty until the contrary appears. By record proof it is shown, that the 100,000 acres were charged with taxes in the year 1815 and thence to this time; and it also appears by Auditor Bennett's statement, that the land was not sold and could not be vested in the literary fund. This is stated in answer to the allegation of Plaintiffs in error to defeat the force of the first order, that it "does not aver that the land was not vested in the literary fund." But this allegation is not necessary to give jurisdiction. The County Court is a Court of Record, and in cases of release of delinquent land has exclusive jurisdiction. Upon the subject of jurisdiction, see Voorhes vs. Bank U. S., 10 Peters.

Taylor vs Baptist, 9 Leigh. Cox vs Thomas, 9 Grattan. Taylor vs Burnsides, 1 Grattan, 165. As to the power of the Auditor—He is directed by the twenty-first and twenty-second sections to correct his delinquent lists. See Taylor vs Burdett, 11 Leigh. All that is necessary to give jurisdiction, is, that it should appear by the order that it was an application to the Court, by the owner or purchaser, to release land delinquent, and that the applicant has legal possession, and this appearing it is not necessary to set out the facts. The judgment itself is the material part. What it orders as to exoneration is binding until reversed. It cannot be questioned collaterally. The omissionof the words "on the premises," in the proof, cannot defeat the judgment. By the order, it appears the question of property to pay taxes to the Sheriff was before the Court and adjudicated, which must stand; as it was, without question, a matter within the jurisdiction of the Court, and sufficient whereon to maintain the judgment of exoneration, upon a collateral objection. With regard to the amended order at the following December Court, it was competent for the Court to correct clerical errors. These orders are reduced to writing, approved and adopted by the Court and given to the Clerk to enter; he omitted words; and it is competent for the Court to correct such error. 4 Leigh, Ewbank vs Rolls ex. 308. Haskins vs Forsyth, 11 Leigh, 294. Voorhes vs Bank U. S., 10 Peters. Fisher vs Baptist, 9 Leigh. Cox vs Thomas, 9 Grat. 502. Taylor vs Burnsides 1 Grat. 165.

It is objected that all, or the major part, of the land did not lie in Kanawha County. The 100,000 acres was in Kanawha, when patented. It was charged in Kanawha only; and was released in Kanawha. When lands lie in two or more counties, the Collector might go into either to levy the tax. 2 Revised Code, 547, § 17-18, and 16. Same Vol., page 33, § 65-66-67-71. When lands are charged in a county where they do not lie, the Commissioners of the county where they actually lie, must take measures to have them transferred. 2 Rev. Code, page 20, § 17.

It is the duty of the officers to have the change made; and if they fail to do so, the owner cannot suffer for the omission of the officers of the State. This is a well settled principle.

A familiar case is referred to, and often adopted by the Supreme Court. It is made the duty of the surveyor to bound his land by plain marked lines, and natural objects. Yet if he fail so to do, and the survey nevertheless can be identified, the survey is good. Here the land is charged in Kanawha and returned delinquent as land in Kanawha; and all done by officers of the State. The State would be estopped from saying, the land was not in Kanawha. And here it may be observed, the State is not complaining, but has, by her officer, near thirty years before, acknowledged the regularity of the proceeding, and corrected the delinquent lists, and exonerated the land. Strangers now come in, long after all has transpired, and ask the State to reverse her decision, for the benefit of late squatters, and recently acquired equities.

Again, the Section last referred to, (71) legalizes entries made by commissioners of the revenue in one county, when part of the land lies in another. The Act is remedial, and must be construed so as to effect the intention of the Legislature. That was, to enable the owner, by a convenient remedy, to exonerate his lands. To go to the other counties would be almost impracticable. The Legislature regarded the land as lying in the county where it was charged, and from which it was returned delinquent. See Supplement, 348, § 5.

Next objection, the orders of the County Court, signed by a Junior magistrate. The Act says: "the Minutes shall be signed by the first Justice in commission, *then sitting*." When sitting? At the time when the Minutes are signed. Because David Ruffner was sitting during the day, it by no means follows he was sitting at the *close* of the Court. The fact that Daniel Ruffner signed the Minutes, is conclusive that he was *then* the elder justice. See 1. Rev Code, page 251, § 19. The words at the close of the section, "shall be of force or valid," mean that the Minutes unsigned, shall not be valid. When signed it is conclusive as to the *reading*.

It is said the entries and surveys are equitable interests, of which there was no possession, and that the claimants could not be sued in Ejectment. See Code of Virginia, page 610, § 5. Title Ejectment, chapter 135, and the whole chapter. Section 5 is copied from the New York Statute, and by its

terms authorizes the suit against defendants not in possession, and claiming some interest therein. They (the Plaintiffs in error). claim an equity, which is an interest therein. This Act has been interpreted, as above indicated, by the Supreme Court of New York, 5 Hill, Bowyer vs Empie, 50.

A review of the case, as presented in this abstract, will dispose of all the authorities cited by Plaintiffs in error, as well as of all their instructions.

The first and second instructions asked by the Defendants in error, are sustained by the authorities and facts set out in the record, and in this abstract, all which authorities will be used in support of them.

The third instruction of Defendants in error, is on the questions of adverse possession, and the Statute of limitations. See the following authorities: McClure vs Clark, 10 Grattan. 8 Johnson (New York) 101 and 228. 10 John, 447. 12 John., 368 and 16 John. Code of Virginia, § 20. in Ejectment Emrick vs Toomer, 9 Gratt, 11 Gratt., 605. 13 Gratt. 14 Gratt., 60.

The Defendants in error will also use any or all the references of Plaintiff in error in the record,

B. H. SMITH,
Attorney for Defendants in error.

additional authority
On construction of Statute
Post master Gen'l vs Early 12 W. 136 —
Edwards Lessee vs Darby 12 W. 206
Lessee of O. S. Wolcott vs Heirs Walton 10 Pet: 1 —
On jurisdiction —
Grignon's Lessee vs Astor 2d How: 319
On adversary Possession —
Jackson vs Thomas 16 John: R. 301. Jackson vs Waker 12 idem 365 - 1st Cedem 156. 2d idem 230
Hopkins vs Beard 6 Munf: 38 on reservations

Berry H. Smith for appellees

Supreme Court of the United States.

HARVEY AND OTHERS *vs.* TYLER AND OTHERS.

Additional brief, to come in at page 90 of Record.

Samuel Hollingsworth, the patentee of the 100,000 acre tract "called Jabel," conveyed one moiety thereof to Jesse Waln and others in 1798, and the other moiety in 1799, the first of which deeds was recorded in Kanawha county in February, 1799, and the other in June, 1800. See Record, pages 34 to 40.

By section 30, 2 Rev. Code, page 24, the clerk of the county is required to deliver to the Commissioner, by the 1st of February annually, a list of conveyances recorded in his office within the preceding year, by which the Commissioner is to charge the land to the grantees.

Jesse Waln and others were charged with the 100,000 acre tract for the years 1799 and 1800, as appears by the certificate of Auditor Bennett, Record, p. 65, the certificate of Auditor Heath, Record, p. 53, and the Commissioner's land books, Record, p. 68.

Being properly so charged, it was not lawful for the Commissioner to change the same, or charge said 100,000 acre tract to Abijah Dawes or any one else, "but upon evidence of record that such transfer or entry is proper," see 2 Rev. Code, p. 19, sec. 12. Sec. 15 of same act, 2 Rev. Code, p. 20, makes it the duty of the owner to enter his land on the books of the Commissioner. And sec. 16 of same act, same book and page, makes it the duty of the Commissioner upon failure of the owner to furnish the requisite information, "to tax the said land agreeably to the best information he can obtain, and class the same accordingly, anything in any law to the contrary notwithstanding."

And by 2 Rev. Code, page 537, sec. 3, all non-residents were required to give to the Commissioner designation and

situation of their lands, to be entered on his books. And upon their failure, he was required to make the entry according to the best information he could obtain. And if any error should occur in the description of any tract of land, or in the name of the owner, the said land should, nevertheless, be liable to all the effects of that or any other law, subjecting the same to sale or forfeiture for the *non-payment* of the taxes assessed thereon.

It is objected by the defendants in error that the 100,000 acre tract, "called Jabel," could not be forfeited for the taxes delinquent thereon in the names of Jesse Waln and others, for the years 1803 to 1814, amounting to $906 10, because Jesse Waln and others had conveyed the said tract to Abijah Dawes, in 1800, and thereafter had no interest in the land. But the Record, page 41, neither there nor elsewhere shows that the deed from Jesse Waln and others to Abijah Dawes was ever recorded in Kanawha county, or elsewhere in Virginia, or that the Commissioner had any knowledge thereof.

And if it were allowable to speak out of the Record, it never was so recorded, unless it has been done recently.

The commissioner therfore properly retained the said tract of 100,000 acres on the books in the names of Jesse Waln and others, in failure of the parties to furnish him with the proper record evidence to authorize and enable him to transfer it to any one else, until the year 1815, when it was charged to the Delaware Bank, J. Hollingsworth and John Shallcross.

And by the latter clause of section 3, 2 Rev. Code, 537, and sec. 4, Supplement, page 347, the forfeiture not only divested the title of the parties in whose names it was charged, but of those claiming under them. The forfeiture being of the land, for the non-payment of the taxes due thereon. See also 15 Grat. 180

That the tract charged in the names of Jesse Waln and others, Jesse Waln, Jesse Waler & Co., Jesse Waller & Co., on the Commissioner's books—see Record, page 68—and returned delinquent in the name of Jesse Waln, &c., as stated by Auditor Bennett—see Record, page 65—and as returned delinquent in the name of Jesse Waller *et al.*, and Jesse Waller *et al.*, as stated by Auditor Heath—see Record, pages 54 and 63—is the same track Jabel, is clearly shown by the fact that the grant to Samuel Hollingsworth describes it as the 100,000 acres called "Jabel."

The deeds from him to Jesse Waln and others describes

it as the 100,000 acres called "Jabel." The deed from Willard to Bruin, under whom the defendants in error claim, describes it as the 100,000 acres called "Jabell," and all call it the land patented to Samuel Hollingsworth. And the two little bonds from Bruin to Saxton & Crook, describe it as the "Jabel tract." See Record, pages 34 to 40, 44, 45, and 46.

Again it is charged on the Commissioner's book for the year 1797, to Samuel Hollingsworth, and for the years 1799 and 1800, to Jesse Waln and others, and taxed for each of those years at $81 60. And thereafter it is not charged to Samuel Hollingsworth, but continued in the names of Jesse Waln, and Jesse Waller & Co., and Jesse Waln, &c., down to the year 1812, and for each of those years taxed at the same $81 60.

During the war it was continued in the same names, but taxed for 1813 at $108 80, and for the year 1814 at $144 50.

In 1815 it was transferred on said books from Jesse Waller & Co., or Jesse Waln, &c., to the Bank of Delaware, J. Hollingsworth and J. Shallcross, and taxed at the same, $144 50, and noted thereon as called "Jabel." See Record, p. 68. And in the certificate of Auditor Bennett it is called "Jabel," and delinquent in the name of Jesse Waln, &c. See Record, p. 65.

The certificate of Auditor Bennett also shows that the said tract of 100,000 acres, called "Jabel," was never charged on the Commissioner's books in any other names than as stated in his certificate, either in the counties of Kanawha, Mason, or Jackson, in which parts of the land lay.

If, therefore, as contended by the counsel for defendants in error, it should have been entered on the Commissioners books in the name of Abijah Dawes, in whom the title was for the years 1803 to 1814, inclusive, but was never so entered, then it was forfeited for non-entry. See Sess. Act of 1835, p. 12, sec. 2; 15 Grat., 190; and Sess. Act of 1852, Levassor *vs.* Washburn, 11 Grat., 576.

Additional authorities to show judgment cannot be amended after term: 4 Rand., 161; 11 Grat., 822; 2 Hen. and Mun., 477; 2 Va. cases, 553 and 555; 2 Tucker's Com., 45 and 327.

In addition to authorities cited on pages 71 and 84 of record, see Regina *vs.* Guardians of Hartley Union, 1 Queen's Bench Rep., 677; Christie *vs.* Union, 11 Adolph. and Ellis, 373; Ormsly *vs.* Lynch, Littell's Select Cases, 306–7.